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New Limits to the Clear and Present Danger Doctrine

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RECENT CASES

NEW LIMITS TO THE CLEAR AND PRESENT DANGER DOCTRINE

Arthur Terminiello was found guilty, in the Municipal Court of Chicago, of violating an ordinance of the city by making an improper noise or diversion tending to a breach of the peace. The case grew out of an address he delivered in an auditorium in Chicago under the auspices of the Christian Veterans of America.[1] Terminiello, advertised as a Catholic Priest, but revealed to be suspended by his bishop, was brought to Chicago from Birmingham, to address a gathering that had assembled in response to a call signed by Gerald L. K. Smith. The meeting was apparently well publicized, some eight hundred persons being present in the auditorium while more than a thousand were gathered outside to protest and picket the assemblage. Police were present but were unable to prevent several disturbances. Into this charged atmosphere of name calling and sundry other excesses,[2] Terminiello entered and commenced his diatribe. The range of his abusive harangue was extensive[3] and Justice Jackson faithfully records the provocative racial and political denouncements which were so freely hurled by Terminiello[4] and which caused the meeting to come to a sudden close after some brick-hurling and Terminiello's arrest. Following a jury trial, he was found guilty of disorderly conduct in violation of a city ordinance of Chicago[5] and was fined. The trial court had charged that breach of the peace consists of any "misbehavior which violates the public peace and decorum;" and that the "misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates

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1. The factual background was gleaned from the majority opinion by Douglas, J., and the dissent by Jackson, J.

2. "They called us 'God damned Fascists, Nazis . . . [objects were] thrown at the officers, including ice picks and rocks. The front door was broken partly open . . . Smith opened the meeting with prayer . . . ' " 337 U. S. 1, 69 Sup. Ct. 894, 900-901, 93 L. Ed. 865 (1949).

3. " 'Fellow Christians, and I suppose there are some of the scum got in by mistake . . . we have fifty-seven varieties of pinks . . . we had Queen Eleanor . . . we have Henry Adolph Wallace, the sixty million job magician . . . then Chief Justice Stone had this to say . . . ever heard of Morganthau plan for starvation of little babies and pregnant women in Germany? . . . Franco was the savior of what was left of Europe . . . I am a Christian Minister . . . let us call them Zionist Jews . . . we want them to go back where they came from . . . we will not be tolerant of that mob out there . . . we are strong enough . . .!' " 337 U.S. 1, 69 Sup. Ct. 894, 900-904, 93 L. Ed. 865 (1949).

4. Dissent by Jackson, J., 337 U.S. 1, 69 Sup. Ct. 894, 899-911, 93 L. Ed. 865 (1949).

5. [As found in the principal case] "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city * * * shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense." Sec. 1 (1), c. 193, Rev. Code 1939, City of Chicago. Cf. Wyo. Comp. Stat. 1945 sec. 9-408: "Breach of Peace—Whoever by any loud or unnecessary talking, hallooing, or by any threatening, abusive, profane or obscene language, or violent actions, or by any other rude behavior, interrupts or disturbs the peace of any community in this state or of any of the inhabitants thereof, shall be guilty of a breach of the peace and upon conviction thereof shall be fined not more than fifty dollars [$50], or confined in the county jail not more than thirty [30] days, or both."

a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[6] Petitioner took no exception to the instruction but at all times maintained that the ordinance as applied to his conduct violated his right of free speech under the Federal Constitution.[7] His conviction was affirmed by the state courts and he brought the case to the United States Supreme Court on petition for certiorari. *Held,* in a five-to-four decision, that a conviction of Terminiello resting on this construction of the ordinance, to the effect that if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest, he should be guilty of breaching the peace, could not stand since such a construction constituted an infringement of the constitutional right of free speech and this was true though petitioner took no exception to the instruction given which was the basis of the conviction. The majority held that freedom of speech, though not absolute, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *Terminiello v. City of Chicago,* 337 U.S. 1, 69 Sup. Ct. 894 93 L. Ed. 865 (1949).

Four justices dissented: Vinson, Frankfurter, and Burton on the technical legal grounds of appellate procedure; Jackson, on the ground that the conviction in the lower court was not an infringement of the constitutional right of free speech. Vinson, Ch. J., dissented because a reversal on the basis of a sentence in the trial court's instructions to which no objection had previously been taken did not accord with the principles heretofore followed governing review of state decisions by the United States Supreme Court. The other dissentors concurred in this with Jackson adding a lengthy dissent of his own on the merits. Aside from questions of appellate procedure, the vital issue in the case concerns the constitutional right of free speech.

Justice Douglas enunciated the majority view as follows: "The vitality of civil and political institutions in our society depends on free discussion . . . it is only through free debate and exchange of ideas that government remains responsible to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[8]

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6. From the majority opinion, 337 U.S. 1, 69 Sup. Ct. 894, 895, 93 L. Ed. 865 (1949).

7. U.S. Const. Amend. I., as incorporated in U.S. Const. Amend. XIV.

8. 337 U.S. 1, 69 Sup. Ct. 894, 895-896, 93 L. Ed. 865 (1949), Justice Douglas noted that the fact that petitioner took no exception to the instruction was immaterial. Relying on Stromberg v. Cal., 283 U.S. 359, 51 Sup. Ct. 532, 15 L. Ed. 1117 (1931), it was said to be sufficient that Terminiello had attacked the constitutionality of the ordinance in general for it was said that an attack on the whole is an attack on any individual part. As construed and applied, portions of the ordinance were invalid. Since the verdict was a general one it could not be determined whether Terminiello was not convicted on the invalid portions. Terminiello had at all times challenged the constitutionality of the ordinance as construed and applied to him.

It would seem that in the majority view a clear and present danger of a serious substantive evil did not exist. At least, it did not rise "far above public inconvenience, annoyance or unrest."[9]

Justice Jackson's dissent, on the merits, and concurred in by Justices Frankfurter and Burton, is basically that Terminiello's remarks, taken in relation to their setting, did constitute a clear and present danger of a serious substantive evil. "As this case declares a nationwide rule that disables local and state authorities from punishing conduct which produces conflicts of this kind, it is unrealistic not to take account of the nature, methods and objectives of the forces involved. This was not an isolated, spontaneous and unintended collision of political, racial or ideological adversaries. It was a local manifestation of a worldwide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind have devastated Europe. Increasingly, American cities have to cope with it. Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish. Where an offense is induced by speech, the court has laid down and often reiterated a test. . . . In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate . . ."

Upon an initial and cursory examination, the *Terminiello* case may appear to extend the limits heretofore recognized in freedom of speech. Years ago, Justice Holmes laid down the test of the limits in the right of expression: "The question in every case [of the alleged infringement of the constitutional freedom of speech and press] is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[10] Although the test is now some thirty years old, modernly it is still recognized as the standard for the court to apply.[11]

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9. 337 U.S. 1, 69 Sup. Ct. 894, 896, 93 L. Ed. 865 (1949).

10. Holmes, J., for the majority in Schenck v. United States, Baer v. United States, 249 U.S. 47, 52, 39 Sup. Ct. 247, 249, 63 L. Ed. 470 (1919).

11. "The power of a state to abridge freedom of speech is the exception rather than the rule. . . . The limitation upon individual liberty must [to avoid unconstitutionality] have appropriate relation to the safety of the state." Herndon v. Lowry, 301 U.S. 242, 258, 57 Sup. Ct. 732, 739, 81 L. Ed. 1066 (1937).

"[Freedoms of speech, press, assembly, and worship] are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." West Virginia St. Bd. of Ed. v. Barnette, 319 U.S. 624, 639, 63 Sup. Ct. 1178, 1186, 87 L. Ed. 1628 (1943). " . . . any attempt to restrict those liberties [of speech and press] must be justified by clear public interest, threatened not doubtfully or remotely, but by a clear and present danger . . . actual or impending." Thomas v. Collins, 323 U.S. 516, 530, 65 Sup. Ct. 315, 323, 89 L. Ed. 430 (1945).

In Bridges v. Cal., 314 U.S. 252, 262, 62 Sup. Ct. 190, 193, 86 L. Ed. 192 (1941), Black, J., for the majority, indicated the value and use of the test: " . . . the 'clear and present danger' language of the Schenck case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or a minority of this Court in passing upon the constitutionality of convictions under espionage acts, Schenck v. United States, supra; Abrams v. United States, 250 U.S.

Perhaps the best proof of its continued validity is the fact that in the instant case *both* the majority view[12] and the dissent[13] applied it to the facts. Thus the *Termineillo* case apparently resolves itself to this: the majority was of the opinion that Terminiello's speech did not create a clear and present danger to the public welfare; the dissent (on the merits) was of the opinion that it did.

However, while this analysis gives the case some meaning, as perhaps illustrating a more liberal holding under the doctrine, it is not an inevitable construction. In a recent comment,[14] it is vigorously suggested that the Supreme Court avoided the real issue in the case. That real issue is suggested to be the question of the intentional breach of the peace by Terminiello by the use of "fighting words" and the courts avoidance thereof by "ferreting" out portions of the trial court's charge.[15] This interpretation, which was in the first instance pointed out by Justice Frankfurter in the principal case,[16] could follow from what is, in many respects, a rather terse majority opinion by Justice Douglas. After noting the factual situation, Douglas indicates the position Terminiello had consistently assumed—that the ordinance as *applied* to his conduct violated his right of free expression. The jurist then continues, and regretably so, to confuse the court's ultimate holding by mentioning a point first raised in the Illinois Appellate Courts—whether the content of petitioner's speech was composed of fighting words which carried it outside the scope of the constitutional guarantees—and then summarily dismissing this question by noting that the preliminary question of the trial court's application of the ordinance to Terminiello's speech would be dispositive of the case. It is this unfortunate manner of presentation, then, which has caused doubt in at least one writer's mind as to the meaning of the case and prompted the offer that the court was side-stepping. In reply, it is submitted that the court's avoidance of he issue, *if* indeed it did so, will only have real significance when the reason for such action becomes known. The suggested possibility[17] is neither sharply drawn nor based on any but the most questionable premises.

616, 40 Sup. Ct. 17, 63 L. Ed. 1173; under a criminal syndicalism act, Whitney v. California [274 U.S. 357, 47 Sup. Ct. 641, 71 L. Ed. 1095]; under an 'anti-insurrection' act, Herndon v. Lowry, supra; and for breach of the peace at common law, Cantwell v. Connecticut, [310 U.S. 246, 60 Sup. Ct. 900, 84 L. Ed. 1213] . . . very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is 'destruction of life or property, or invasion of the right of privacy,' Thornhill v. Alabama, 310 U.S. 88, 105, 60 Sup. Ct. 736, 745, 84 L. Ed. 1093."

For other applications of the Clear and Present Danger Doctrine see: Participation of Labor Unions in Political Campaigns, 2 Wyo. L. J. 124, 125, (1948); Statutory Prohibitions Against Interracial Marriages, 3 Wyo. L. J. 159, 163, (1949).

12. 337 U.S. 1, 69 Sup. Ct. 894, 896, 93 L. Ed. 865 (1949).
13. 337 U.S. 1, 69 Sup. Ct. 894, 905, 93 L. Ed. 865 (1949).
14. Rosenwein, The Supreme Court and Freedom of Speech—Terminiello v. City of Chicago, 9 Law. Guild Rev. 70 (1949).
15. Id. at 71-76.
16. 337 U.S. 1, 69 Sup. Ct. 894, 898, 93 L. Ed. 865 (1949).
17. The commentator, supra note 14 at 72, suggests, "Justice Douglas' view of the meaning of freedom of speech in our constitutional system appears to be as follows: There is no expression of opinion or belief which may not be limited at one time or another by Government. The 'clear and present danger' rule is the operational method for placing these restrictions upon freedom of speech. The 'lice' and

Putting conjecture aside, the fact remains that the one point consistently urged by Terminello was passed on by the court—although, in so doing, the mechanics of procedure may have been violated by "ferreting" out portions of the trial court's charge to which no specific exception had ever been taken. As a procedural matter, the case would seem to stand for little that could be counted on as well founded precedent in future litigation. Again, if the view be taken that in fact the court went out of its way to protect Terminiello and steadfastly avoided the real issue for some reason, only the purest surmise may be indulged in to ascertain the motivation behind the holding. But if the case is properly acknowledged to be one in the field of clear and present danger and free speech, it at least has some value—in view of the factual situation involved. The latter position receives strength not only from the majority's expressed holding but from Mr. Justice Jackson's near vehement dissenting view emphatically recognizing this as a clear and present danger case.

Viewing the case then as one in this field, what, if any, is its significance? The majority and minority applied one and the same test. It is true that the main opinion relies on what is perhaps an addition and extension to the conventional test first proclaimed by Holmes; Justice Douglas cites *Bridges v. California*[18] to the effect that the danger must rise far above public inconvenience, annoyance or unrest. But aside from this slight variation of the usual standard, the case seems most accurately to resolve itself to this: "There is no objectivity in constitutional law because there are no absolutes. Every constitutional question involves a weighing of competing values. Some of these values are held by virtually everyone, others by fewer people. Supreme Court justices likewise hold values. The more widely held are the values in society, the more likely the Supreme Court will hold them; the more controversial the values, the more likely the Supreme Court is to divide over them."[19] Whatever personal views

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'scum' utterances of a Terminiello enjoy equal constitutional status with any expression of opinion or belief." The writer goes on to assail the use of any test, least of all clear and present danger, proclaiming that speech under the constitution was intended to be absolutely free—but that racial or religious slanders were never within the constitutional guaranty as not being the "exposition of ideas." The implication is strong that the use of the doctrine has invaded the right of untrammeled expression from its very inception and that the courts now are committed to the view of governmental restraints on freedom of speech. It is then suggested that such commitment, together with a use of the doctrine, must lead to the allegedly undesirable result achieved in the Terminiello case, whereas a decision on the issue of fighting words could only have resulted in a finding against Terminiello. Mr. Rosenwein maintains the Court went out of its way to avoid the issue of fighting words and insisted on an application of the established doctrine.

18. 314 U.S. 252, 262, 62 Sup. Ct. 190, 193, 86 L. Ed. 192 (1941). The Bridges case relied on Schneider v. State, 308 U.S. 147, 161, 60 Sup. Ct. 146, 151, 84 L. Ed. 155 (1939), which first gave rise to this extension in somewhat different form: "In every case, therefore, where legislative abridgement of the rights [of free expression] is asserted, the court should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

19. Braden, The Search for Objectivity in Constitutional Law,—Yale L.J. 571 (1948).

may be taken of the positions followed in the instant case[20] at least it can be said that there is a limit—"Liberty of speech and press is . . . not an absolute right, and the state may punish its abuse."[21] That the *Terminiello* case did not hold the boundary of permissible expression to have been exceeded may be unfortunate—"There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[22] However, what does appear clear is that the instant case is another in a series of liberal pronouncements by the Court—and, when the case is considered in the light of the factual background, with perhaps an even greater leaning to the left than has heretofore been evidenced.

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LOSS OF GOOD WILL AS DAMAGES IN CONDEMNATION PROCEEDINGS

The United States condemned the Kimball Laundry in Omaha, Nebraska, for use by the army for an initial term of eight months, to be extended from year to year at the election of the government. It was extended several times. As the laundry had no other means of serving its customers it suspended business during this time. The measure of damages was held by the United States District Court for the District of Nebraska to be, primarily, the rental value of the property.[1] The Court of Appeals for the Eighth Circuit affirmed the district court on appeal by the Laundry, which claimed as damages the loss to the company due to the destruction of its "trade routes" or business "good will." The Supreme Court of the United States granted certiorari. *Held,* that while the measure of damages (rental value plus depreciation) is correct, under the "just compensation" clause of the Fifth Amendment the Laundry should also be compensated for the loss of its "trade routes." *Kimball Laundry v. United States,* 69 Sup. Ct. 1434 (1949).

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20. It should be noted that the majority (and liberal) block of Justices Douglas, Black, Reed, Murphy and Rutledge, has now been reduced to a possible minority—pending the revelation of the attitudes of the successors to the latter two jurists.

21. Near v. Minn., 283 U.S. 697, 707, 51 Sup. Ct. 625, 628, 75 L. Ed. 1357 (1930). Also " . . . the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom." Gitlow v. N.Y., 268 U.S. 652, 666, 45 Sup. Ct. 625, 630, 69 L. Ed. 138 (1924).

22. From Jackson's dissent, 337 U.S. 1, 69 Sup. Ct. 894, 911, 93 L. Ed. 865 (1949).

1. A board of appraisers appointed by the district court according to Nebraska law set the rental value to the United States at $74,940 a year. The Government and the Laundry both appealing the award, in trial by jury an annual rental of $70,000, and $45,776.03 for damages to the plant were awarded, plus interest at 6 per cent on the rental for the initial term from the time the army took possession until the first renewal, on the rental for each year after that from the beginning of the year until paid, and on damage to the plant from the date of verdict.